No. 14254

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Appellee's Statement of the Evidence.

Appellee, beginning on page 4 of its brief, quotes the Agreement between the Neil Company and Minnesota Mining Company, and argues from such quotations that this shows that the Neil Company was to have complete supervision and exercise control over the premises on which the accident occurred. We believe, to the contrary, that the Agreement shows that the Neil Company did not have complete supervision and control over the premises because the Minnesota Mining Company not only had the right to amend, add to or change the plans and specifications at any time during the course of the work (Art.

1), but it also reserved the right to perform such work as it deemed necessary or expedient on the premises at any time. (Art. 8.) But the main point which Appellant makes is that the Neil Company did not have control of the premises as against the California Electric Power Co. At page 7, Appellee states that:

> "The Neil Company drew all the plans and did all the engineering during the entire course of the construction."

This is not true as to the work done on the substation where the accident occurred. As to the substation, the California Electric Power Co. prepared its own plans for the power station site, including details of the retaining wall [R. p. 435], and when the blueprints of the substation site which the Neil Company prepared did not conform to the blueprints for the site which the California Electric Power Co. had, the Neil Company changed its blueprints to conform to those of the California Electric Power Co. [R. p. 351.]

Appellee, at page 9 of its brief, cites, as evidence of control of the premises by the Neil Company, the fact that it "kept guards there to keep unauthorized persons out of the area." But such guards were not effective against the employees and the crews of the California Electric Power Co. The evidence shows that the California Electric Power Co. employees and crews went on the premises whenever its construction operations required it, and they were not stopped at any time at the entrance to the premises, nor did they have to secure permission from the Neil Company to go upon the premises. [R. pp. 437-438 and 441-442.] Unlimited and uncontrolled admission of California Electric Power Co. crews to the premises for substation construction work was not a matter of grace,

but a matter of right; the California Electric Power Co. crews prosecuted this construction work under an easement in gross, given it by the Minnesota Mining Company; the California Electric Power Co. was not a subcontractor of the Neil Company, but acted independently of it under rights given it directly by the owner.

II.

The California Cases Cited by Appellee Are Not Determinative of the Question of the Existence of the Primary and Secondary Insurance Doctrine in California.

As its first point under its argument, Appellee claims there is no primary or secondary insurance theory in California, and has cited three cases which, it is claimed, support this proposition. While there is language in these cases which upon cursory examination would appear to support the proposition advanced by Appellees, a careful analysis will show not only that the reference to primary and secondary insurance is unnecessary to the decisions, but also that the cases are factually and legally distinguishable from the case at bar.

The first case cited is *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.* (1941), 45 Cal. App. 2d 288, 113 P. 2d 34. This action was brought by Consolidated Shippers, the insured under two policies, one issued by Pacific Employers and the other by Commercial Standard Insurance Co., for a loss sustained by Consolidated. Commercial had issued a policy of public liability insurance insuring one Harvey and/or Consolidated against loss arising from the ownership, maintenance or use of a Chevrolet truck owned by Harvey. Pacific issued a policy of public liability insurance under which it insured

Consolidated alone against loss by reason of liability imposed by law resulting from the operation of all automobiles other than those owned by Consolidated which transported goods on a contract basis for Consolidated.

At a time when both policies were in effect, Harvey, while transporting merchandise in his Chevrolet truck under contract with Consolidated, was involved in an accident, and in the subsequent action a judgment was rendered against Consolidated. It is noted that both policies contained provision for proration of insurance. In the action by Consolidated against the insurance companies the trial court found Commercial primarily liable with Pacific secondarily liable after the exhaustion of Commercial's policy limits. The District Court of Appeal affirmed the trial court originally, but on rehearing, reversed its first opinion as will be set forth hereafter. Justice Walton J. Wood dissented and in his dissent repeated the original opinion.

The true basis for the reversal is found in the Opinion at page 291:

> "While it is true that the Commercial policy covers Harvey as well as plaintiff, *there can be no doubt as far as plaintiff is concerned, that the risks covered by both policies were co-extensive.* If the policies had in effect the same coverage, neither could be primary, but both insurers were jointly liable." (Emphasis added.)

It must be noted that Appellee omits a significant part of the opinion in the quotation from this case found on page 11 of its brief. The opinion states at page 293:

> "Moreover, the court *made no finding on the issue of primary and secondary liability as between Harvey*

and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk SO FAR AS PLAINTIFF is concerned, *the fact that plaintiff's liability may have been primary or secondary becomes immaterial."* (Emphasis added.)

It is observed that in addition to there being no finding as to the relationship between Harvey and Consolidated and hence no basis for determining how Consolidated was held liable, the question of circuity of action was not raised. Where there is a basis for determining primary and secondary liability the question then is whether the one secondarily liable can recover from the one primarily liable. This, of course, was not raised, discussed or passed upon by the decision.

In view of the facts of the case and the specific language of this decision, it is submitted that it is not authority for the proposition that there is no primary or secondary liability in California.

The second case cited by Appellee is *Air Transport Mfg. Co., Ltd. v. Employers Liability Insurance Corp.* (1949), 91 Cal. App. 2d 129, 204 P. 2d 647. The language relied upon by Appellee in this connection is on page 132, and states:

> "This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.,* 45 Cal. App. 2d 288 (114 P. 2d 34).)"

The foregoing statement is erroneous in that it is contrary to the express provisions of Section 402 of the Vehicle Code of the State of California which reads as follows:

> "Section 402(d). In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all of the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."

Furthermore, the only authority cited for the proposition that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof is the *Consolidated Shippers* case, *supra,* which, as has been pointed out above, is not authority for such a principle.

Actually the *Air Transport* case is decided on a comparison of the escape clauses in the respective policies of the two insurance companies involved. In this connection, the case has been distinguished, and the actual holding clearly identified in *Gillies v. Michigan Millers, etc. Insurance Co.* (1950), 98 Cal. App. 2d 743, 221 P. 2d 272. The court said at page 751, referring to the *Air Transport* case:

> "There, the court decided one question. Was Employer's policy rendered void because of the existence of the other valid insurance? Or to be more specific, was the policy issued prior to that of Employers valid insurance within the meaning of the 'other insurance' clause of the defendant's policy? The court held that the term 'valid insurance' contemplated insurance which provides unconditional coverage and that since the Pacific policy afforded only prorate coverage, it did not meet the requirement . . ."

It is submitted that the *Air Transport* case cannot be considered authority for Appellee's asserted doctrine.

The third case cited by Appellee is *Employers Liability Insurance Corp. v. Pacific Employers Insurance Co.* (1951), 102 Cal. App. 188, 227 P. 2d 53. Again the court, in passing, rather than as a point for the actual decision of the case, states at page 192:

> "The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tort feasor is liable for excess insurance only has been rejected in California. (Citing the *Consolidated* case and the *Air Transport* case.) *Moreover, in the instant case, neither Appellant nor Respondent insured the party driving the car involved in the accident.*" (Emphasis added.)

In *Employers Liability Insurance Corp. v. Pacific Employers Insurance Co., supra,* the statements about primary and secondary liability are dicta as neither policy afforded extended coverage to the negligent driver and the dicta is supported only by the *Consolidated* and *Air Transport* cases. The decision in the case turned on the effect of the escape clauses in each policy and the court held that inasmuch as the policies had in effect the same coverage, neither could be primary, but both would be jointly liable.

In none of the three cases cited by Appellee and distinguished above was there raised or discussed the question of the ultimate circuity of action that might develop. Thus, these cases cannot be considered as authority against the points raised by Appellant in the present case, nor do they support the proposition that the decision of this court in *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.,* 172 F. 2d 836, is contrary to California law.

Appellee urges that on the basis of the foregoing, the Appellant and Appellee were co-insurers and the loss should be apportioned equally in accordance with the rule in *Lamb v. Belt Casualty Co.* (1935), 3 Cal. App. 2d 624, 40 P. 2d 311. The cases mentioned above cannot be considered authority for such a proposition and the *Lamb* case is not at all in point. There the plaintiff was insured by two companies. In an accident, the plaintiff was himself negligent and no question was presented of liability solely through the act of any employee. Thus, where two companies insure the same party, no question is presented such as that involved in this present action.

It is submitted that the cases hereinabove discussed do not establish any substantive law on the point asserted by Appellee and are not authoritive on the issues here presented. The rules of law expressed in the line of cases commencing with *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.* (9 Cir.), 172 F. 2d 836, are sound and it is submitted, are controlling on the question of primary and secondary liability under the circumstances of the cases at bar. We believe that this court has well distinguished the above cited California cases in *United Pacific Insurance Co. v. Ohio Casualty Co., supra,* where it points out on page 844 of its Opinion that as to the negligent employee, there is no double insurance. There is only one policy of insurance on the ultimately liable employee and *that* insurance must be the primary insurance.

III.

Pacific Is Subrogated to the Rights of the Neil Company Against Its Negligent Employees.

In the second main point of its argument, Appellee, beginning at page 13 of its brief, takes the position that there is no basis upon which Appellant may claim any right to subrogation. As a subheading, Appellee sets forth the proposition that "There is No Contribution Between Joint Tort Feasors Under California Law." As to this point of law standing alone, no one can take exception. The question is whether the Neil Company is a joint tort feasor along with its negligent employees. This, in turn, depends upon whether its liability for negligence is based solely upon the doctrine of *respondeat superior* or whether there is corporate negligence contributing proximately to the injury.

In furtherance of its argument, at pages 13 and 14 of its brief, Appellee takes the position that the supervisorial employees of the Neil Company were *"solely insured by Pacific."* Such is not true. The Pacific policy had *no* extended coverage provisions. It insured only the corporation—the Neil Company. The insurance status of the various persons involved in this matter is as follows:

(1) The Neil Company was insured by Hartford for automobile insurance including the loading and unloading of automobiles, and was insured by Pacific for general liability including automobile insurance under certain limited situations.

(2) The flagman, Ford, and the truckdriver, Walker, were insured only by Hartford under its extended coverage provisions extending coverage to employees engaged in the unloading of automobiles.

(3) The supervisorial employees, Jensen, Grace and Jones, had no insurance for their personal liability for negligent acts.

We believe that Appellee's argument that Pacific has no right of subrogation can be answered as simply as this: If the Neil Company itself were negligent, then it would have no right of action against its joint tort feasors, and by the same token, there would be no right of subrogation in Pacific. But, if the Neil Company was not negligent, then it would have a right of action against its employees for liability incurred by it caused by their negligence, and Pacific would be subrogated to this right of action.

In its Statement of the Evidence, Appellee has set forth what it believes to have been the negligence of the supervisorial employees of the Neil Company as follows:

(a) That Jensen sent a Neil Company employee to the substation site to "clarify" the matter, but not to "stop" the operation (Appellee's Br. p. 8);

(b) That Grace did not get Jensen's message about stopping the back-filling until after the accident had happened (Appellee's Br. p. 8); and

(c) That the fill had reached the top of the wall or even over the top and knowledge of the danger was proven by the order to stop dumping, which order was negligently not delivered (Appellee's Br. p. 18).

None of the acts outlined above by the Appellee are corporate acts or acts in furtherance of corporate policy. If, in fact, the fill had reached the top of the retaining wall, and Jensen did not order the back-filling to be stopped, his failure to do so could not be said to be in furtherance

of corporate policy, but simply an act of negligence on his own part. If, on the other hand, the court believes the other line of evidence which is to the effect that Jensen did order the back-filling to be stopped, but that the message was negligently delivered and did not reach Grace until after the accident had happened, such negligent delivery would not be in furtherance of corporate policy, but would be an individual act of negligence either of Jensen in failing to see that his message got through, or in the employee entrusted to make delivery of the message in stopping along the way.

IV.

The Right of the Neil Company to Recoup Its Losses From Its Negligent Employees Is Contractual in Nature and Governed by the Period of Limitations Applicable to Implied Contracts; Therefore, the Subrogative Right of Pacific to Enforce the Right of the Neil Company Had Not Been Barred by the Statute of Limitations.

Appellee's contention that the insurer is subrogated to the same statute of limitations as the insured is a correct statement of law (*Automobile Insurance Co. v. Union Oil Co.,* 85 Cal. App. 2d 302), but is not correctly considered in its application to this case in Appellee's brief. Appellee mistakenly goes on to assume, without citation of authority, that the insured is bound by the same Statute of Limitations in his suit for indemnification that the injured party was bound by in his original tort action. As we will show hereafter, such is not the law.

As stated in Appellant's opening brief, the right of the employer to recoup or indemnify himself for sums paid out because of the tortious acts of an employee is

based upon an implied contract of indemnity. This right of the employer is based upon the breach of a duty imposed upon the employee by law as an integral part of the contract of employment, whether this contract be express or implied. (See 35 Am. Jur. 530, Sec. 101.)

The right of the Neil Company to recover against its negligent employees is, therefore, contractual. Being contractual, and implied rather than express, the right is governed by the period of limitations prescribed in Code of Civil Procedure, Section 339(1). Any action by the Neil Company against its employees to recoup its losses incurred by reason of the negligent conduct of the latter, must be based upon the breach of this contractual duty; the Neil Company has no right to recover for personal injuries against those employees. Consequently, the provision of Code of Civil Procedure, Section 340(3) have no application to this right.

As stated by Appellee, Pacific is subrogated to the right of the Neil Company against the negligent employees. This right in Pacific is no more or no less than it is in the hands of the Neil Company. Since the right of the Neil Company is contractual in nature and governed by the Statute of Limitations prescribed by California law for implied contracts (Code Civ. Proc., Sec. 339(1)), so this same right in the hands of Pacific is governed by the same statute.

This same issue was passed upon by the Ohio Court of Appeals in the case of *Ohio Casualty Insurance Co. v. Capolino,* 44 Ohio L. Abs. 564, 65 N. E. 2d 287. In that action, the employer's insurer sought to recover from a negligent employee the sum paid to a third party as compensation for injuries caused by the negligence of

the employee. The employee's counsel argued that the action was barred by the shorter period of limitations prescribed for personal injury actions, whereas the insurer's counsel urged that the longer period of limitations prescribed for actions upon contract applied. The Ohio Court decided that the employer's right was based upon an implied contract of indemnity, and that the subrogating insurer's action to enforce that right was governed by the longer period, saying at page 565:

> "The plaintiff's contract of insurance was with the Equity Savings and Loan Company (employer), and upon settling a claim against its assured, became by its contract, subrogated to the loan company's rights. This action, therefore, is one in indemnity and sounds in contract and not tort." (Insert ours.)

Since the Neil Company's right to indemnify against the employees did not accrue until January 27, 1951, the date on which payment to Richard D. Carter was actually made, the Statute of Limitations would not bar the enforcement of such right until January 27, 1953. Pacific, being subrogated to this right of the Neil Company, had exactly the same period of time within which to enforce that right.

The argument of Appellee with respect to the effect of the agreement entered into between Hartford and Pacific [R. pp. 132-136] is an attempt to alter the intent of the parties expressed in clear and unequivocal language. The expressed intent of the parties to the stipulation was to forestall any claim of waiver of rights by virtue of the passage of time.

V.

The Court Has the Right to Establish Subrogation Rights in a Declaratory Relief Action.

Appellee argues that Appellant cannot first raise its claim of right of subrogation on appeal. Such is not the fact. In its answer, Appellant alleged its right of subrogation. [R. p. 63.]

Appellee further argues that the negligence of the employees cannot be determined because they are not parties. But under the issues, a specific finding of negligence was made. [R. p. 115.] The parties before this court are no different than the parties before the court in *Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731: In that case, two insurance companies were parties and the negligent employee was not a party; yet, in the declaratory relief action, the court made a finding on the negligence of the employee and the Appellate Court subrogated the secondarily liable insurance company to the recoupment rights of the employer.

VI.

The Finding of Negligence on the Part of the Supervisory Employees of the Neil Company Does Not Make the Corporation Liable as a Joint Participant, but Only Under the Doctrine of Respondeat Superior.

Appellee contends that the negligence of the Neil Company supervisory employees constitutes the direct negligence of the corporation so that the corporation becomes a joint tort feasor with the negligent employees. As has been pointed out, the negligence, if any, of the supervisory employees was that of omission rather than commission.

Appellee correctly states the law that negligence may be active or passive—the doing of a proper act carelessly, or the careless failure to do a proper act. (*Basler v. Sacramento Gas and Electric Co.,* 158 Cal. 514, 518, 111 Pac. 530.) That proposition of law, however, misses Appellant's point. The distinction between active and passive negligence becomes important only when the question of law is not as to the liability of the negligent employees themselves or of the employer under the doctrine of *respondeat superior,* but when the question of law is the liability of the corporate employer as a joint participant in the negligence. The corporate employer is not a joint participant in the passive negligence of its employees, whether supervisory or non-supervisory.

McInerney v. United Railroads, 50 Cal. App. 538, 549-550, 195 Pac. 958, is a case in point. There the corporation was held liable as a joint participant, but the acts of the employees were active acts of negligence which the court found were directed by the corporate employer.

Similarly, in *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948, the tort resulted from active negligence—the operation of the train at an excessive rate of speed—and the court held that the evidence showed that it was being operated "at a rate of speed predetermined by the defendant corporation."

The case of *McCullough v. Langer,* 23 Cal. App. 2d 510, 73 P. 2d 649, cited by Appellee, involved an individual employer, a doctor, and his employee, a nurse. The physician employer was held as a joint participant because, as the court states, at page 517:

> "Under the circumstances of this case, the nurse was presumed to attend the patient *under the super-*

vision and direction of her employer, Dr. Langer." (Emphasis added.)

Furthermore, Dr. Langer was actually a joint participant in the negligence in that he himself directed the nurse to leave on the lamp that caused the burn. (P. 514 of opinion.)

In the case of *Newman v. Fox West Coast Theatres,* 86 Cal. App. 2d 428, 194 P. 2d 706, the court held the evidence was such that the jury could have found that the failure of the corporation to have sufficient personnel present to maintain the theatre could have been the proximate cause of the accident, rather than any act or omission on the part of the theatre manager. In such a case, the negligence would be that of the corporation itself, rather than that of its manager, and the corporation would be liable as the tort feasor. There is no such evidence in the instant case.

In spite of Appellee's argument, it seems clear on the authority of the cases of *Bradley v. Rosenthal, supra,* through the *McInerney* and *McCullough* cases, that only where the employee is acting under and pursuant to the direction of his employer will the employer be deemed to be a joint participant in the tort.

It is also clear that in the case at bar, the supervisory employees of the Neil Company who were found by the trial court to be negligent, were, at the most, negligent in *failing* to act—in failing to stop the back-filling.

VII.

The Neil Company Did Not Have Control of the Premises.

The Appellee relies upon the interpretation of "control" testified to by their expert, Mr. Payson. He based his interpretation upon his interviews with contractors, but then went on to say that "it is rather unusual that the contractor comes in to discuss this point with us" [R. p. 423] and actually he had discussed the point only once with one contractor some six years ago. [R. p. 423.]

Appellee cites *Langaza v. San Joaquin L. & P. Corp.*, 32 Cal. App. 2d 678, 90 P. 2d 825, to the effect that "right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement." The quotation which is taken from 17 Am. Jur. 993, goes on to state:

> "The right of the easement owner and the right of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. It has been held that the rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil."

Here, the owner has granted an easement to California Electric Power Co. and has entered into a construction contract involving the same premises with the Neil Company. It is proper for the owner to permit its remaining rights in the property to be exercised by a third person, but neither the third person nor the easement owner has control but their rights are governed by prin-

ciples permitting an equitable adjustment of the conflicting interests. (*Pasadena v. California Michigan, etc. Co.*, 17 Cal. 2d 576, 583.)

In *Louthan v. Hewes,* 138 Cal. 116, 70 Pac. 1065, the contractor had control in the sense that he was a contractor rather than an employee and therefore not subject to the control and direction of the owner.

The instant case involves a situation where there are two independent contractors—the Neil Company and the California Electric Power Co.—and so long as the latter exercises dominion over the premises for purposes granted it by the owner, it cannot be said that the Neil Company has control over such premises.

Respectfully submitted,

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